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QUESTION PRESENTED

A manufacturer's admittedly defective herbicide "conscripted" for use by the United States in Vietnam caused injuries to veterans of the United States Armed Forces, many of whom were themselves conscripted into service, and who were then denied— through the judicial creation of legal doctrines consistently favorable to the manufacturer—a full and fair opportunity to recover damages from the manufacturer for their crippling and fatal injuries.

Is it "obviously right" for this Court, at the request of the manufacturer, to now create additional new doctrine requiring the United States to indemnify the manufacturer for certain costs associated with the manufacturer's avoidance of trial, and any substantial liability to those veterans, and their families, who were injured as a result of exposure to dioxin in the manufacturer's herbicide, when that dioxin was not included in the government's design specifications for the herbicide but the courts nevertheless deemed the government contractor defense applicable to the petitioners?

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Agent Orange Coordinating Council ("the Council") is a unique coalition of veterans organizations committed to obtaining justice for Vietnam veterans exposed to herbicides known as Agent Orange. Inspired by the leadership of the Council's Chairman, Admiral Elmo R. Zumwalt Jr., (USN Ret.)—who during the Vietnam War served as Chief of Naval Operations, and more recently was the Special Assistant to the Secretary of Veterans Affairs—twenty-one service organizations chartered by Congress to represent the interests of veterans and their families, and nine non-chartered veterans' organizations, joined together in support of the petitioners to this Court in *Ivy v. Diamond Shamrock Chemicals Co.*, 781 F. Supp. 902 (E.D.N.Y. 1991), *aff'd*, 996 F.2d. 1425 (2d Cir. 1993), *cert. denied,* 114 S.Ct. 1125 (Feb. 22, 1994) ("*Ivy*"). The Brief *Amici Curiae* of Agent Orange Coordinating Council, The American Legion, Veterans of Foreign Wars of the U.S., Disabled American Veterans, Amvets, [et al.] in Support of Certiorari, filed therein on January 27, 1994, cited the purposes for which Congress chartered some of the constituent organizations of the Council, such as "to uphold and defend the Constitution," 36 U.S.C § 43, to promote "fidelity to its laws," §823(a), and "to encourage the doctrine of universal liberty, equal rights and full justice to all," §2702(5); to "stimulate to the highest degree possible the interest of the entire Nation in the problems of veterans, their widows, and orphans," and "to foster love for the principles which they have supported by blood and valor," § 57(a).

This second *amicus* Brief submitted to this Court by the Council is intended to serve these same goals. The specific interests of *amicus* in this case, in light of the considerations discussed more fully in the Statement of the Case, are:

1) to provide a context from the perspective of the injured serviceman for understanding this case, which is about the legal consequences to defense contractors from furnishing defective products that allegedly injure members of the Armed Forces;

2) to assure that the historical record concerning the injustice suffered by veterans exposed to Agent Orange is not beclouded, in this sole case concerning Agent Orange accepted for review by the Court, as a result of legal or factual assumptions, or incidental comments, that are not fully informed, and sensitive to the concerns and painful inequity suffered by the injured veterans;

3) to express a sense of extreme concern by the injured veterans that, while they have been unjustly denied —through the invention of a series of novel doctrines of law for no apparent reason other than to protect the financial welfare of the manufacturers of Agent Orange—any substantial remedy against the manufacturers whose defective product destroyed their lives, the federal judiciary should not compound this injustice by creating further doctrine from scant and unpersuasive source material that would protect the wrongdoers from any financial responsibility whatsoever for the injuries they caused veterans and their families;

4) to protest against the proposition of petitioners that United States taxpayers should subsidize the costs of the manufacturers' collusive class action settlement, the vehicle by which veterans were denied their due process rights in the federal Agent Orange litigation; and

5) to protect the interests of present and future members of the United States Armed Forces, who are the potential victims of future such defective products, by supporting the United States' position in this suit that the minimal financial deterrent to a manufacturer of defective products that injure servicemen should not be nullified by means of the taxpayer indemnification of tort litigation expenses that is proposed by petitioners in this case.

STATEMENT OF THE CASE

1. The *Ivy* Case

In *Ivy v. Diamond Shamrock Chemicals Co.*, *supra*, some of the possibly 90% of all veterans injured by dioxin contaminant in petitioners' Agent Orange who suffered their injuries only after a May 1984 settlement, and following a latency period from the date of exposure that averages 20 years, filed a class complaint in Texas state court. These veterans were absent from, unrepresented in, and ultimately disserved by the May 7, 1984 "nuisance value" settlement of Agent Orange claims, which is the subject of this case.

The *Ivy* plaintiffs argued both constitutional and factual reasons why the 1984 settlement could not and did not apply, without their knowledge, consent, or adequate representation, so as to extinguish, in advance, their then merely potential future claims against the manufacturers of Agent Orange. They submitted weighty new evidence that Agent Orange was the cause of their injuries and cited authority that this Court's definition of the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) would preclude its application to their case. *See Joint Eastern and Southern Dist. Asbestos Litig.*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990); *cf. In re Agent Orange Product Liability Litigation*, 611 F.Supp. 1223 (E.D.N.Y. 1985) *aff'd*, 818 F.2d 187 (2d Cir. 1987), *cert. denied*, 487 U.S. 1234 (1988) (summary judgment).

Ivy was transferred from Texas on questionable grounds, *see Ivy v. Diamond Shamrock Chemical Co.*, 901 F.2d 7 (2d Cir. 1990), to Judge Weinstein in Brooklyn, N. Y., who then denied the veterans discovery or trial on the disputed factual issues, found the claims properly removed from state court on novel grounds, and dismissed them on grounds that all future Agent Orange claims by veterans had been settled by him in 1984, albeit unbeknownst to the plaintiffs themselves. His decisions were upheld by the Second Circuit, which added its own factual conclusions contrary to both Judge Weinstein's

assumptions and to the evidence in the record.

The Circuit also ignored by misinterpretation plaintiffs' claim that Judge Weinstein's role as sole fiduciary for a $52 million foundation (the "Agent Orange Class Assistance Program") which would lose $10 million if *Ivy* succeeded in state court (according to Judge Weinstein's interpretation of an indemnity provision), combined with Judge Weinstein's express reliance on this potential $10 million loss as a reason for denying remand of *Ivy* to Texas, 781 F. Supp. at 911-12, 915, 918, constituted an obvious judicial conflict of interest in violation of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

Judge Weinstein's assumption that remand of *Ivy* would "consume the $10 million set aside" in his foundation, 781 F. Supp. at 918, expressed his judgment that some *Ivy* plaintiffs and putative class members would in fact win their claims if remanded to state court. The Circuit assumed the contrary by ignoring evidence in the record and drawing on literature it found outside the record. Mrs. Ivy's Petition to this Court, No. 93-860, followed on November 24, 1993.

Amici in *Ivy*, cumulatively representing 8 million Americans in an unprecedented unanimous effort in this Court by all significant official veterans organizations, sought to fulfill the statutory goals stated above by impressing upon this Court the importance of the *Ivy* Petition. *Amici* strongly urged this Court to restore to Agent Orange victims their "fundamental constitutionally derived ... right to have grievances adjudged by a jury of one's peers." They criticized the "wholesale abandonment" by the federal courts of those due process rights that were "systematically denied" to the veterans in order to impose upon them the same 1984 settlement that is the subject of this case.

Recognizing the flaw in the Circuit's reasoning in imposing the settlement on the *Ivy* plaintiffs, *amici* observed that, "[f]ar from providing 'full justice,' the cruel result of that settlement has been to restrict Vietnam veterans and their dependents to the receipt of nuisance value recoveries of

approximately $3200 when they suffer total disability or when they die as a result of their exposure to products manufactured by [Hercules, et al.]." Lesser injuries received no compensation at all under the 1984 settlement.

Amici therefore "advised" this Court, as they felt "duty bound" to do, to review and ultimately reverse the "Second Circuit's extraordinary disregard of [the veterans'] due process rights" and its "usurpation of legislative and judicial powers" by imposition of an unwanted "settlement" on the *Ivy* petitioners, in a "travesty of justice." The Brief *Amici Curiae* supported the *Ivy* Petition because the federal courts' "decisions ... create a threat to settled law, to constitutional values of due process, and to the welfare of thousands of severely ill veterans and their families." *Id.*, at 2-6, 20.

In addition to this strong urging from all of the country's oldest, largest, and most deeply respected patriotic organizations, the highest group of legal officers in the land, by their filing of *amicus curiae* briefs in this Court, also unanimously requested that this Court grant the veterans' Petition for review. The attorneys general of all fifty States, in their wholly unprecedented unanimity of support for a private party, or any party on Petition for Writ of Certiorari, expressed the generals' firm opinion that the federal courts "*ad hoc* interference" had wrongly deprived Vietnam veterans of a chance to present their due process claims in an impartial State forum. Brief *Amici Curiae* of the States of Texas (et al.), No. 93-860, 1.

The *pro bono* attorneys for the *Ivy* petitioners, led by Harvard Law School Professor Lawrence H. Tribe, who is at the same time a leading academic and perhaps the foremost constitutional litigator of his era, had sought Supreme Court review not only of the substantial Due Process Clause issues addressed by the veterans organizations' *amici* Brief, but also of a "radical All Writs removal doctrine" by which the federal courts had acquired jurisdiction over *Ivy*, against the strong opposition that the States' attorneys general expressed, in turn, to all three levels of the federal judiciary.

The "All Writs removal doctrine" applied in *Ivy* was an unprecedented interference with states' rights to control claims arising exclusively under state law in state courts between state citizens. This doctrine postulated, in Professor Tribe's paraphrase, that by using their general equity powers "federal judges may circumvent ... seven removal statutes ... 'to remove an otherwise unremovable state court case,' in the discretion of the judge, 'when the need arises." Petition for Writ of Certiorari, No. 93-860, at pp. i and 25.

This discretionary removal technique had been used by the federal courts in *Ivy* to acquire jurisdiction so as to assure that no state court would be able to follow existing law and accord to the Agent Orange veterans their constitutional right to a jury trial of their claims. This foreclosed any state court from putting to the test the federal courts' erroneous, and unenforceable edicts on contested issues of fact which underlie their cheap settlement, and which now reappear as unsettled issues in this case. These issues are, most importantly, the government contractor defense and causation. Both questions were kept from a jury by unorthodox procedures in the federal courts that conferred enormous financial benefits on the manufacturers.

This Court's denial of *certiorari* in *Ivy* had the effect of leaving unreviewed the Circuit Court's significant and novel rulings of law, and its erroneous assertions of fact that cavalierly invaded the province of the jury. This Court's denial of *certiorari* in *Ivy* consequently left uncorrected one of the most profound and, in both money terms and human terms, perhaps the greatest injustice at one stroke in the history of American jurisprudence.

Having presented highly substantial legal and constitutional claims with their impressive academic and unprecedented official legal support, alongside the equally unprecedented solidarity of the official veterans service organizations, all as described above, the affected Vietnam veterans were appalled, shocked, and numbed by the refusal of even four of nine judges constituting the highest court of the country for

which they risked their lives and their health, in one of its dirtiest and most difficult wars, to find the time and interest to review the substantial legal issues presented by their Petition, on matters of life and death to them.

These deserving, patriotic Americans were left with a bitter taste of injustice, not even certain that the law invoked by New York federal courts to provide a veneer of legality to the injustice done them is the same law that governs every other American. This perception of injustice and discrimination deepened when the Court within weeks of rejecting the *Ivy* case heard and decided legal issues similar to those raised by *Ivy*, in such cases as *Ticor Title Ins. Co. v. Brown,* 511 U.S. ___, 114 S.Ct. 1359 (April 11, 1994) (*certiorari* dismissed as improvidently granted, after argument was heard, March 1, 1994, on the due process rights of absent class members); *Kokkonen v. Guardian Life Ins. Co. of America,* 114 S.Ct. 1673 (argument heard March 1, 1994, on the existence of inherent post-dismissal federal jurisdiction to enforce settlement agreements); *Liteky v. U.S.,* 114 S.Ct. 1147 (March 7, 1994) (addressing less persuasive conflict of interest recusal of federal judge than presented in *Ivy*). *Cf. Hess v. Port Authority*, 8 F.3d 811, *cert granted,* 114 S.Ct. 1292 (March 21, 1994) (governmental immunity). None of these cases impressed veterans as being nearly so significant as their own case, by any standard of measurement.

Now veterans perceive as adding an even deeper insult to their grave injuries that the Supreme Court has deemed the Agent Orange manufacturers' highly "implausible" claim, *see* Brief for the United States in Opposition (etc.)("Opp.") at 13, for indemnification by the United States, which is financially worth only a tiny fraction of the veterans' destroyed claims, to be of sufficient import as to occupy space on the Court's calendar which no one of the veterans' numerous petitions were deemed to merit. This will be the only Agent Orange connected case to be addressed by the Supreme Court out of at least 12 petitions over the years.

Little more than one year ago as many as 250,000 potential members of *Ivy's* proposed class of injured Vietnam veterans residing throughout the nation, 8 million of their sympathetic brethren speaking through their congressionally-chartered organizations, and the highest legal officers of all 50 states, were denied this precious opportunity for a hearing involving the same subject matter and some of the very same issues raised by two manufacturers in this case. The difference between these two cases is that the veterans in *Ivy*, and supporting *amici,* naively expecting justice to be blind, started their analysis from traditional and established principles of law, demonstrated wide and deep support for these principles, and were then systematically denied the results that the unbiased application of those principles would yield.

By contrast, the two petitioners here frankly appeal to the result-oriented jurisprudence they have come to expect in the Agent Orange litigation. They start with the result they seek, indemnification of settlement expenses, deliver self-interested *amicus* support for that result, and then "search[] for the proper legal theory upon which" to base that result. *See* Brief of Petitioners ("Br. Pet.") 16. A further difference is that while the thousands of injured United States veterans were innocent of any wrongdoing, and happened to be placed in harms way as a result of their unrewarded, patriotic service to their country, the manufacturers of Agent Orange, including petitioners here, were wrongdoers who sold a defective product at market rates to the government, and to commercial users, and are powerful enough to get away with it.

2. Petitioners' Complaint

With this Court's denial of certiorari in *Ivy*, the Agent Orange manufacturers reaped the enormous benefit of the collusive bargain they struck in *Ryan v. Dow Chemical Co.*, 618 F.Supp. 623 (E.D.N.Y 1985), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). This

settlement in *Ryan*, imposed on the *Ivy* class against their knowledge or will, was purchased by the manufacturers at the cost of a $180 million payment to the District Court for distribution in the District Judge's discretion. At least $13 million was distributed to the attorneys who signed the class action settlement, $52 million went to the "AOCAP Foundation" controlled by the same judge who approved the settlement, and a large unknown amount went to pay the administrative costs of various consultants and staff hired by the judge. Only "nuisance value" amounts were paid from the remainder, plus the interest accrued over the ten year pay-out period, to the fraction of the injured veterans who had death or total disability claims acceptable to the administrators of the fund.

Now petitioners, who shared fully in the windfall benefits of this "settlement" of Agent Orange claims against them, complain that they should recover from the United States their portion of the expenses paid to obtain the immunity from liability against all the veterans' present and future claims that their "settlement," as interpreted in the *Ivy* case, bought them. Petitioners' claims are before this Court on dismissal of their complaints, as affirmed by the Court of Appeals. The question before this Court is whether the complaints are sufficient to state a claim, assuming to be true all factual statements in the complaints that are not inconsistent with any facts established by law.

The petitioners bring an action for breach of implied warranty, which is available under *United States v. Spearin*, 248 U.S. 142 (1918), where a defect "in the plans" provided by the government created liability to its contractor for damage caused by strictly following those plans. Br. Pet. at 17. The petitioners also claim that a provision in the Defense Production Act ("DPA"), 50 U.S.C. app. § 2061, *et seq.*, (1988 & Supp. V 1993) may be read to convey not just an immunity against breach of contract claims caused by the government's requisition of goods away from prior commercial commitments, but also to provide the government's

indemnification of expenses incurred in defending tort claims that arise from defects in the goods that predated and lacked any causal relationship to the requisition. At bottom, petitioners plead that the facts which they portray deserve the creation of some doctrine, from the easily distinguishable materials they cite, allowing them to recover their costs from government.

Petitioners argue that the government's "specifications were defective because they resulted in a product that contained dioxin, the substance that the Agent Orange plaintiffs claimed caused their injuries." Br. Pet. 26. Petitioners complaints do not allege that the government's specifications called for dioxin as part of the Agent Orange formulation, or that there was no way to make Agent Orange without contamination from dioxin. Nor do petitioners claim that the procurement officials who purchased petitioners' Agent Orange either knew that petitioners' Agent Orange did contain dioxin, or knew the process for ridding their product of dioxin. Nor do they claim that everything in the files, or past reports, of the government may be imputed to procurement officials.

Hercules does describe how it managed to avoid contaminating its herbicide with dioxin approximately one year after it started production of Agent Orange. Complaint, at Joint Appendix ("J.A.") 11-12.

SUMMARY OF ARGUMENT

Veterans in *Ivy* fought hard for an unbiased state forum to adjudicate the issue of whether they settled for "nuisance value," in 1984, claims that did not then exist. Instead, this question was answered by federal Judges Weinstein and Van Graafeiland in opinions that interfered with state proceedings in order to impose the courts' own result-oriented rulings denying veterans their right to a day in court. To support their desired result of a cheap global settlement of Agent Orange claims, the federal courts opined that the veterans

could not win their claims anyway, and made summary findings, or speculations, concerning key questions of fact, that were themselves inconsistent. Their opinions substituted the judges' rationalized policy preferences for established rules of law, all to the benefit of the manufacturers.

The manufacturers now seek to exploit to their own further advantage, those inconsistencies that were the byproduct of the instrumental, unprincipled approach to judging that characterized the Agent Orange litigation.

Petitioners' effort to obtain reimbursement for their relatively small share of the "nuisance value" payments and legal expenses the manufacturers made to secure a collusive settlement with class action plaintiffs' lawyers is unsupported by existing law, and is not "an obviously right result." Br. Pet 16. It would be an obviously wrong result for federal courts to create new doctrine requiring taxpayers to assume petitioners' costs of making a corrupt, collusive settlement by which Vietnam veterans were denied an opportunity for a day in court against those who caused their injuries. Federal courts have provided too many such benefits to petitioners.

Petitioners should not be allowed to exploit the ambiguities and inconsistencies created by the unique result-oriented procedures in the *Agent Orange Litigation* to create special new doctrine that would circumvent the limitations of existing government contract law, for the purpose of again rewarding these particular manufacturers with additional protection against liability for their own wrongdoing.

Neither *Spearin* nor the DPA can be interpreted to accord the relief requested by petitioners on the facts petitioners have pleaded without doing violence to those provisions. *Boyle v. United Technologies Corp.*, *supra*, draws a well-defined boundary between those cases where the cloak of governmental responsibility and immunity is cast over the conduct of a governmental contractor that damages a third party, on the one hand, and those cases where the contractor itself must take responsibility for damage which it has caused, on the other. This Court's decision in *Boyle*

extended sovereign immunity principles to protect government contractors from third party claims, thereby shifting the burden of loss to innocent victims precisely in those situations where the government, not the contractor, was responsible for the damage due to its exercise of discretion to approve a defective design.

Neither *Spearin*, the DPA, nor any equitable doctrine should impose on the taxpayer a further obligation to reimburse the losses of contractors who cannot satisfy *Boyle*. If the government is not held responsible, on the basis of an exercise of its discretion to contract for defective design specifications, then there is no justification for shifting the burden of loss away from the manufacturer, whether to the innocent victims, or to the government. A manufacturer should be responsible for defects which it introduces in its product. This constitutes the only real deterrent to future such mass injuries as those suffered by the Agent Orange victims.

Petitioners' complaints on their face show that they cannot satisfy either *Boyle* or *Spearin*, because the dioxin is not alleged to be part of the government's design specifications. *See generally*, United States' Memorandum, J.A. 34. Petitioners' settlement payment was a measure of petitioners' assessment of their risk from the potential inapplicability of the government contractor defense, if not in the present certainly in the future. Their settlement was far more a purchase of insurance-like protection against future claims that would not be barred by this defense, such as those in *Ivy*, than it was a settlement of present claims. If these future claims would not have been barred by the government contractor defense, petitioner must absorb its own expenses in "settling" these claims. *Boyle* provides the exclusive protection for any claims that would have been barred by this defense

ARGUMENT

Petitioners' claims fall between two stools. On the one side sits the alternative that petitioners' equitable plea for relief against the government could be justified by facts showing that the government is responsible for defective design specifications that injured veterans. In such circumstances, *Boyle*, or even the broader government contractor defense created to immunize petitioners from liability in the *Agent Orange Litigation*, is petitioners' sole remedy for otherwise valid claims against them by third parties. Although it is true that the contractor's defense was not well defined at the time of the 1984 settlement, all versions protected contractors who were not at fault, or in the *Agent Orange* version, even where they were at fault. *Joint Eastern and Southern District Asbestos Litigation*, 897 F.2d 626, 634-35 & n.8 (2d Cir. 1990). Under facts where the government is responsible for a design that injures third parties, a government contractor may assert the government's sovereign immunity and thereby avoid liability. There is no need for an indemnification remedy against the government in such circumstances, and none exists.

On the other stool sits the alternative suggested by facts both stated and pregnantly not stated by petitioners. Under these facts: petitioners were responsible for the defect which caused the veterans' injuries; *Boyle* would not have furnished a conclusive defense against the veterans' Agent Orange claims; and a jury would have probably found against petitioners on that defense and causation, notwithstanding judicial statements to the contrary. In such circumstances, neither equity nor law would support a government indemnity of contractors against liability for their own negligent acts that cause injury to third parties.

To the government it is irrelevant on which of these two stools this case rests. For that reason Judge Plager's statement, quoted by petitioners, about the ultimate resolution of this issue being unknown, Br. Pet. 18, (which itself only

reflects an insufficient understanding of the underlying facts), is irrelevant. Under either of these factual alternatives, petitioners' attempt to obtain indemnification must fail. Therefore petitioners' highly fact-bound argument aims squarely between these two stools.

Between these two stools is the collusive class action settlement by which federal courts, speaking out of both sides of their mouth about factual issues, ultimately protected petitioners from enormous potential liability to veterans injured by Agent Orange. Had the veterans not been sold out by a collusive class settlement of benefit primarily to petitioners and class action lawyers, with the blessing of the federal judiciary, they would have presented the contested factual issues of causation and of the government contractor defense to juries. Juries eventually would have accepted the mounting evidence of causation and also rejected the applicability of the contractor's defense, as did Judge Oakes in *Joint Eastern and Southern District Asbestos Litigation*, 897 F.2d at 634-35 & n.8. Offensive collateral estoppel would then have stripped petitioners of the defense for subsequent claims, *see Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979), and the damages for the subsequent provable claims would have been enormous. It is with some understatement that petitioners state: "the settlement that [the manufacturers] accepted was significantly lower than their exposure at trial." Br. Pet. 27. *Cf. id.* 19 ("possibility of ... billions of dollars").

Petitioners avoided a legitimate risk of exposure at trial, but now want to reverse the key positions that they took, and that the courts adopted, which helped them avoid any significant liability, *i.e.,* that the veterans lacked evidence sufficient to go to a jury on either causation or the government contractor defense.[1] Now petitioners claim that

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1 Shortly after issuing its ruling in *Boyle*, 487 U.S. 500, this Court denied a writ of certiorari to review the summary judgment against the opt outs from the settled Agent Orange case, which

their product was defective, that it probably did injure veterans, and that a jury may well have ruled against them on the government contractor defense. This is closer to the truth. But the question is why petitioners should not be bound by the federal courts' contrary summary rulings, however remote from the facts, that nevertheless served to permanently strip the veterans of their rights for the purpose of rescuing petitioners from the risk of enormous liability.

If these rulings denying causation and applying the contractor's defense were good enough to inflict one of the greatest injustices in the history of the federal judiciary on injured Vietnam veterans, they are good enough to estop petitioners from questioning them in this suit. Petitioners have sought and embraced the full effect of the settlement, even against future claimants. They should not be allowed to now reject its factual premises, appealing to the "realities of litigation," for the purpose of avoiding even the minimal expense associated with obtaining their collusive settlement.

It would be a perversion of justice to permit petitioners to accept the windfall advantage given them by federal courts against the veterans, and then, against the government, deny the very rulings from which they benefited.

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was based on the government contractor defense. *See In re Agent Orange Product Liability Litigation*, 487 U.S. 1234 (1988). It has been noted that the Supreme Court's action is significantly confusing" because the "two tests are significantly different." Mary C. Hensinger, *Agent Orange and Boyle*, 6 J. OF CONTEMP. HEALTH L. AND POLICY 359, 374 (1990). The Court had denied the writ to review the contemporaneous settlement case some months prior to deciding *Boyle*. *See id.*, 484 U.S. 1004 (1988). Thus the Court had presumably held the summary judgment petition in abeyance pending its decision in *Boyle*. The Court's failure to remand for reconsideration in light of *Boyle* suggests that the Court agreed that a jury could not have found against petitioners on the government contractor defense even under the more conservative *Boyle* test.

I. PETITIONERS HAVE ALREADYRECEIVED EXCESSIVE BENEFITS FROM THE FEDERAL JUDICIARY IN AGENT ORANGE LITIGATION

Petitioners' positions on key issues of fact in this case further support the veterans' evidence that they were the victims of an enormous miscarriage of justice systematically carried out by the federal judiciary for the benefit of the manufacturers of Agent Orange.

A. Corporate Negligence Caused The Product Defect

Petitioners admit that their product was defective in that it contained dioxin. Br. Pet. 13. Without this allegation they could not maintain a breach of warranty claim.

Moreover, Hercules' Complaint, at J.A. 11-12, describes how Hercules, within a year after it started production, managed to avoid contaminating its herbicide with dioxin. Its excuse for not doing so prior to that date is apparently that it did not know about the extraction process. Therefore, after 1966 Hercules produced defoliant in accordance with government specifications by combining commercially available chemicals in certain concentrations. But before that date it failed to fully comply with those specifications by also including dioxin contaminants in its delivered product.

Petitioners do not claim that they took reasonable steps to determine whether production processes that they used would create dioxin as an unwanted byproduct. Nor do they assert that the government was the only source of such knowledge, or that any existing government information about dioxin contamination was secret, or not generally available to petitioner upon reasonable inquiry. Instead petitioners admit that they may have had less knowledge than other manufacturers about dioxin. Br. Pet. 19.

The same failure of pleading is true of the dioxin extraction process, about which petitioners have failed to plead any excuse for their lack of timely knowledge. Only if the government somehow actively maintained secrecy

about these two issues, thereby frustrating reasonable efforts to acquire the information—obviously not the case here and not alleged—could the government be responsible for the product defect resulting from petitioners' own ignorance.

Since petitioners' complaints provide no such factual allegations, the conclusion remains that the petitioners' negligence in failing to locate an existing extraction process for eliminating dioxin from its Agent Orange product *prior* to initiating production caused their product to be defective. The complaints show nothing in the government's product specifications that either requested or required a product containing dioxin. Nowhere do the complaints state facts showing that it was impossible to deliver a product consistent with the government's specifications that did not contain dioxin.

Petitioners are legally bound by the factual findings on this issue against them in *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934 (E.D.N.Y. 1992) (remanding civilian claims to state court), *appeal denied*, No. 92-8008 (2d Cir. May 8, 1992)(mem.), *cert. denied sub nom. Dow Chem. Co. v. Brown,* 113 S.Ct. 599 (1992) ("*Brown*"). In the *Brown* case, Judge Weinstein held:

> Agent Orange was a mix of pre-existing chemical formulae that had long been put to domestic commercial use ... The government sought only to buy ready-to-order herbicides, not to cause, control or prevent the production of the unwanted byproduct, dioxin, which is the alleged cause of plaintiffs' injuries. The necessary direct and detailed official control over the acts for which the defendants are now being sued is therefore lacking.

781 F.Supp. at 950-51.

Because petitioners had a full and fair opportunity in *Brown* to prove that the government did have such control over petitioners' production, they would thus be collaterally estopped from arguing that the government forced them or

ordered them, see Br. Pet. 28, to produce a defective product. *See Parklane Hosiery Co. Inc. v. Shore,* 439 U.S. 322 (1979). Without such control, by which the government must take responsibility for design specifications containing dioxin, petitioners can prevail neither on the government contractor defense nor its *Spearin* claim.

B. The Product Defect Caused Injury to Veterans

Although it has never been legally established that exposure to dioxin caused the various injuries suffered by Vietnam veterans, this is more due to the extraordinary handling of the veterans' claims by the federal courts which denied the veterans access to a jury on this issue, than to lack of evidence. Petitioners are reluctant to directly admit that dioxin in their product caused the injuries claimed by veterans. Therefore petitioners recruit an *amicus* who is willing to perform that service for them. The financial relationship of this *amicus* to petitioners is discussed below, pp. 26-27. In any event, petitioners must and do assume that a jury could have found in favor of the veterans even on the weak facts presented in 1984. See Br. Pet. 19. Since those facts were far weaker than the evidence of injury developed after that date, some of which evidence is sketched in the *amicus* brief procured by petitioners, it is crystal clear that many claims in the *Ivy* class were sufficient to be submitted to a jury on the question of causation.

This demonstrates once again that the veterans suffered a gross injustice from which petitioners greatly benefitted when the Second Circuit made erroneous findings of fact, invading the province of the jury, in reliance on texts not of record, and certainly not sworn to, 996 F.2d at 1437, and at the same time chose to totally ignore the sworn testimony on the record of the veterans' expert witness. The veterans' witness, Dr. Cate Jenkins, a scientist with the Environmental Protection Agency, in her filed Affidavit of Cate Jenkins, Ph.D, (EPA), *Recent Scientific Evidence Developed After 1984 Supporting a Causal Relationship Between Dioxin and*

Human Health Effects, (September 3, 1991), set out some of the copious evidence, developed after the date of the settlement, associating dioxin with the types of injuries suffered by Vietnam veterans.

Dr. Jenkins' Affidavit was cited in, and confirmed in relevant respects by, the authoritative National Academy of Sciences' Institute of Medicine, *Veterans and Agent Orange: Health Effects of Herbicides Used in Vietnam* (July 27, 1993). However both studies were entirely ignored by the Second Circuit which was intent on finding, on the basis of obscure and outdated literature consulted *sua sponte*, that Agent Orange did not injure veterans. The Circuit also ignored *Overmann v. Syntex (USA) Inc., et al.*, No. 852-02681 (Div. 5, Circuit Court, City of St. Louis, Mo. July 10, 1991) in which a jury awarded a worker's family damages for a cancer fatality caused by exposure to Agent Orange chemicals.

Hercules attempts to muddy the issue of causation by claiming that "[a]s a result of ... specifications and requirements" under the Defense Production Act, Agent Orange was packaged without warnings. Complaint, Para. 20. In briefing this issue on summary judgment in *Ivy* the manufacturers were unable to produce any contractual or regulatory authority which had in fact precluded warnings of some kind, nor did they reveal any efforts by the manufacturers to question whether all kinds of warnings were precluded. The complaints are deficient in failing to allege facts necessary to raise a question whether any government limitations on specific warnings caused the veterans' injuries.

Similarly Hercules asserts that the government used Agent Orange in "unprecedented quantities, concentrations and rates of applications." *Id.* Para 23. But upon challenge by plaintiffs in *Ivy*, the manufacturers were unable to produce any scientific evidence whatsoever that any of these factors affect the number of injuries otherwise expected on a straight line proportional relationship between exposure to increasing quantities of dioxin and number of injuries.

There is no evidence that dioxin is safe at any minimum level of exposure, and petitioners make no allegation that it is. Each amount of dioxin carries a certain risk of injury irrespective of the delivery mechanism, concentration, or rates of application. It is both unremarkable and foreseeable that the more poison that petitioners produced, the more injuries they would cause. Petitioners' allegations therefore fail to set forth a legal or factual claim of causation, beyond mere innuendo, that the government's mode of distributing dioxin affected in any material way the risk associated with the dioxin produced by petitioners.

C. The Federal Judiciary Served the Manufacturers' Interests by Forcing a Cheap Global Settlement on Unwilling Veterans

Petitioners complain that Judge Weinstein was inconsistent in his rulings, and even that they "entered the settlement under duress" from him. J.A. 26-27. At bottom this seems to be the wrong for which petitioners seek equitable relief, as if taxpayers were guarantors of regular procedures in the federal courts. Petitioners seem to complain that since they were unable to depend upon consistent rulings from the court, they were forced by "realities" to settle even though they had adequate defenses.

Judge Weinstein clearly talked out of both sides of his mouth in the Agent Orange litigation, as petitioners point out. On the one hand he holds that the government contractor defense raises questions for the jury, Br. Pet 6; then he refuses to give those questions of fact to a jury, as required by *Boyle*. One day Judge Weinstein says that Agent Orange claims raise a "possibility of an ultimate liability," claimed to total billions of dollars. Br. Pet 8. Then he dismisses the claims, making them valueless, or nearly the same, forces their settlement for "nuisance value."

In *Ivy* Judge Weinstein again properly assumed that if the veterans were allowed to pursue their claims in state court,

they would recover $10 million, at least. To prevent that from happening he invented a new doctrine to justify removal of *Ivy* from state court. The Second Circuit in *Ivy* participated in the same pattern, by ignoring both evidence before it, and the District Judge's assumption, to deny that the veterans could win their claims. This intentionally distorted view of the facts rationalized the Circuit Court's denial of the veterans' due process rights. 996 F.2d at 1237.

This inconsistency in various factual rulings, however, was not "ironic[]" as petitioners suggest, Br. Pet. 21, but rather calculated. Both courts manipulated the facts for instrumental purposes, and systematically denied veterans their due process rights in order to prevent the veterans from presenting their claims to a jury. The core strategy was to make a cheap collusive settlement between the defendant manufacturers and the lawyers representing present claimants, who admittedly had weak claims, in order to sell out the potentially far stronger claims of all future claimants with whom the settling lawyers had a conflict of interest. Judge Weinstein suggested that there would have been no settlement at all if the future claims were not settled at the same time as the present claims. 781 F.2d at 919.

In order to make such a collusive global settlement of future claims, the courts had to, among other things, avoid an outright dismissal of the earlier and weaker claims. Instead the very weakness of those claims was an incentive for the lawyers who had brought them to sign a cheap settlement agreement sacrificing the future claims, who the settling lawyers did not represent, in exchange for money for the probably worthless present claims, which they did represent. The risk of the court dismissing all present claims and leaving these lawyers with no recovery at all from which to extract fees provided sufficient incentive for them to agree to a collusive sell out of future claims.

This strategy explains Judge Weinstein's refusal to dismiss outright on grounds of the government contractor defense prior to settlement. Otherwise the manufacturers

would have had no apparent reason to put some money on the table for these lawyers' settlement of future claims. If Judge Weinstein had dismissed the claims before forcing a settlement, it was clear that future Agent Orange claims would be brought in state and federal courts around the country that would be beyond his reach, and beyond the reach of such a global settlement. *See In re Agent Orange Product Liability Litigation,* 635 F.2d 987 (2d Cir. 1980), *cert. denied*, 454 U.S. 1128 (1981) (no federal question jurisdiction over Agent Orange claims).

Accordingly, far from disserving petitioner's interests, as petitioners now claim, the judicial inconsistencies that attended settlement were necessary to protect the manufacturers against future claims. Judge Weinstein had to maintain the pretense that he was going to allow the case to proceed to trial in order to conclude a settlement of all present and future claims. Had he simply dismissed the claims before him for lack of sufficient evidence this would not have stemmed the flow of cases. Eventually, as Judge Weinstein predicted, there would have been evidence supporting future claims sufficient to reach a jury. At that point, all of the 250,000 or more claims on which the statute of limitations had not run would become valuable claims, vastly exceeding in worth the "nuisance value" global settlement.

The manufacturers' and Wall Street's justifiable satisfaction with Judge Weinstein's resolution of the Agent Orange litigation was reported widely in the popular and scholarly press. *See* Schuck, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (Harvard U. Press, Cambridge: 1987) 166. In fairness hearings, *see In re Agent Orange Product Liability Litigation*, 597 F.Supp. 746, 764-75 (1984), and elsewhere, the class settlement was broadly criticized by its nominal beneficiaries for being imposed upon them against their will, through lawyers they did not hire and who secured their own fees at the cost of selling out the veterans' claims, for too little, too late. *E.g.* Shuck, *supra*, at 179 (noting "overwhelmingly negative views of veterans about

settlement").

Judge Weinstein's role in imposing the settlement has also been criticized in academic commentary. For example, Professor Schuck, an admirer of Judge Weinstein, discusses the "risk of procedural unfairness ... judicial overreaching and over-commitment" in the Agent Orange settlement, and concludes that, having a "firm commitment to a settlement almost entirely of his own creation .... [Judge Weinstein] could not fairly act as a judge in what, in a sense had come to be his own case." Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example,* 53 U.CHI. L. REV. 337, 362 (1986). Another observer concludes from a colloquium on the subject, "Judge Weinstein provides us with a public example of judicial coercion .... [H]is behavior was nothing short of outrageous." Warshawsky, *Objectivity and Accountability: Limits on Judicial Involvement in Settlement* 1987 U. CHI. LEGAL F. 369, 383, 386.

As shown above the outrage was against the veterans' interests, not the manufacturers' as the petitioners here would have us believe.

II. This Court Should Not Create New Law to Shift the Cost of the Unique Agent Orange Settlement to Taxpayers

A. It is Not "Unfair" to Leave the Cost of Defending Its Defective Product With Petitioners

"It simply cannot be the law" is petitioners' basic premise for their plea that this Court should correct the "profoundly unfair" result of the Agent Orange settlement. Br. Pet. 16-17. Their plea is profoundly misdirected.

The reason for the anomaly by which, a) the federal courts approved the government contractor defense in order to support a dismissal and a cheap class action settlement, while b) there was ample evidence for a jury to hold against petitioners on that defense, is explained above as the product of unorthodox result-oriented judicial tactics. In the judge-

made Agent Orange settlement, petitioners advantageously settled claims which by surface appearances they should have won on motion for summary judgment, or certainly at trial.

On deeper analysis, it becomes clear that if the veterans' due process rights had been observed by the federal judiciary, and the facts exposed, *see* House Government Operations Committee's Twelfth Report, *The Agent Orange Cover-up: A Case of Flawed Science and Political Manipulation,* H.R. Rep. No. 672, 101st. Cong. 2d Sess. (1990), the outcome would have differed. If only a fraction of the veterans' claims had reached a jury, petitioners could have lost many times their cost of settling the present and, more importantly, the anticipated future claims for injuries veterans suffered as a result of petitioners' defective product.

The trial court could not and did not force settlement terms on the petitioners. At worst, petitioners would have had to put their defense to a jury. By making an unprecedented class action designation for tort claims, however, the District Judge acquired direct control over the appointment and fees of class counsel, and authority to impose an unwanted collusive settlement that was primarily of benefit to the defendant manufacturers and the colluding lawyers. Rule 23 of the Federal Rules conveyed very real powers to impose a settlement on "class members," as defined by the judge, against which such "members" were powerless once they discovered their unwanted status.

Petitioners seek to characterize their Agent Orange settlement expense as if it were an inequity to themselves. Arising haplessly from "the realities of litigation," Br. Pet. 22, they argue, their loss should now be made good by the taxpayers.

Petitioners admit that their success at trial, had they not settled, was "far from certain." *Id.* Had due process been observed, and—as Judge Weinstein expected in *Ivy*—juries found against petitioners on their contractor's defense, and awarded damages, petitioners would have had no basis to ask this Court to allow recourse against the government for any

supposed inequity arising from such "realities of litigation." No arguable authority exists for shifting the cost of third party liability claims to the government where the contractor cannot satisfy the minimal conditions of any version of the government contractor defense. All versions of the defense viable in 1984, *see* Br. Pet. 20-21 & n.6, protected all contractors who are not at fault. Similarly the *Spearin* doctrine does and should indemnify only damages for which the government's "defective specifications," Br. Pet. 26, not the manufacturers' processes, are at fault. The United States is not a liability insurer that implicitly indemnifies damages that are legally found to have been caused by the negligence of its contractors.

An enormous gift from the federal judiciary to petitioners of a cheap global settlement, that also harnessed all future Agent Orange litigation to a single favorably disposed judge, prevented a potentially catastrophic loss for petitioners. This gift was, in a sense, insurance against any future liability to the veterans on account of future injuries, that still have not been all counted. The payment petitioners made to the court for this insurance can support no greater argument for indemnity by the United States than would the loss itself against which it provided effective insurance.

There is no equity or fairness in allowing petitioners to retain the benefit of buying their way out of facing a jury on a government contractor defense, a defense that had already been factually shredded by the Justice Department's pre-discovery Memorandum, J.A. 34, and then also provide petitioners an indemnification that must be premised on the assumption that they would have won this defense.

Such a rule would also constitute poor public policy in that it would remove any deterrent against contractors who produce dangerously defective goods for use by the military.

B. Petitioners' *Amici* Add to Their Argument Only A Scent of Impropriety

To lend further superficial support for the appearance of injustice petitioners proffer, they have procured the assistance of two *amicus* briefs. Little needs be said of the Chamber of Commerce *amicus*, and its members' motivation for supporting petitioners' efforts to obtain reimbursement from the government for the cost of corporate wrongdoing. Their brief is premised on an anecdotal understanding of the facts and hence addresses a straw man case, not this one.

It is necessary, however, to address the brief of the second *amicus*, the National Veterans Legal Services Program ("NVLSP"), which appears to speak on behalf of veterans. This organization is not a chartered veterans service organization and does not claim to speak for any such organization. It is a group of lawyers who served, not the broad interests of Agent Orange victims, but their own interests in gaining access to substantial funds made available to them from the collusive settlement.

In its Statement of Interest, NVLSP claims it has been involved in obtaining "compensation through ... judicial remedies," for Agent Orange veterans. NVLSP Br. at 2. But it has not tried to obtain a fair judicial remedy for the veterans' claims against the manufacturers who caused the veterans' injuries. NVLSP has not been known to criticize the 1984 collusive settlement or to seek any alternative remedy against the manufacturers of Agent Orange in any forum. NVLSP did not even join the *amicus* brief filed in *Ivy* in support of the injured veterans by virtually every significant veterans' organization in any way interested in assisting the victims of Agent Orange. *Supra* p. 1.

The failure of NVLSP to seek remedies against those who caused the veterans' injuries is easily explained by the source of its funding. NVLSP received a large portion of its funding, more than $2.5 million, from a foundation financed by petitioners in this case and the other manufacturers of Agent Orange. *See* 781 F. Supp. at 923, 928. As the

principal beneficiary of this foundation, NVLSP has used this funding largely in pursuit of its effort, consistent with its position in this case, to divert attention away from the manufacturers and have the taxpayers, rather than the manufacturers, pay for any injuries caused by the manufacturers' defective product. Due to several doctrines that accord the government immunity from suit for such injuries, with sole recourse to an administrative tar baby, the Department of Veterans Affairs ("VA"), this endeavor of NVLSP was destined to be a largely futile exercise for the veterans as a whole. The limited gains toward this end have been made primarily through legislation commanding the VA to provide modest compensation to a few Agent Orange victims. Agent Orange Act, Public L. No. 102-4 (1991).

In exchange for their more than $2.5 million in grants from money provided, in part, by petitioners, NVLSP subjected itself to the condition that it "may not take a position on the [*Ivy*] case or Judge Weinstein's ruling [dismissing *Ivy*]. Nor may [NVLSP] express opinions as to the causal relationship between agent orange and any specific ailment or condition." Directive from AOCAP Foundation to AO Grantees, "Court Issues Ruling in Ivy Case," (E.D.N.Y. Oct. 4, 1991). By their 10 years' of paid silence these lawyers have sold out the interest of Agent Orange victims in obtaining a day in court on their claims against the manufacturers of Agent Orange.

Now, for the first time, NVLSP enters a case involving those responsible for producing Agent Orange and the injuries it caused. It is not surprising that NVLSP should enter such a case, not to support the interests of veterans, but rather to support the interests of those who caused the veterans injury. Though they kept quiet on instruction about the cause of the veterans' injuries when it might have aided the veterans' quest for justice, they now speak up in this forum too late to assist the veterans themselves.

No veteran will receive an additional penny if the petitioners succeed, with NVLSP's help, in recovering from

respondent the money they provided NVLSP and others in connection with the 1984 collusive class action settlement.

C. No Law Shifts a Contractor's Cost of Defending Third Party Tort Claims to Government

As raw material for fashioning a new doctrine that would fill an alleged lacuna in the law, petitioners invoke precedents that do not apply to the facts they have pleaded. Petitioners thus frankly seek the creation of a new remedy or a judicially implied contract provision requiring the government to indemnify them under the circumstances of this case.

It is no surprise that petitioners are unable to find supportive law or precedent on point. Their case depends on a highly fact-bound revisionist interpretation of the unique events surrounding the Agent Orange settlement, the like of which has not arisen in over two hundred years of government contracting. But the operation of such a new rule for this case could not be confined to the facts of Agent Orange.

A fortiori, if petitioners' settlement of veterans' claims not protected against by petitioners' contested government contractor defense should give rise to an implied contract for indemnification of their litigation expenses, every contractor who actually wins, rather than settles, a suit in which it raises a government contractor defense will also have an implied contractual claim against the government for their litigation expenses necessary to assert and win the defense.

Until the Westfall Act was enacted in 1988, the United States was not required to assume the cost of defending its own employees against third party claims arising out of their employment. *See Falkowski v. EEOC,* 783 F.2d 252 (D.C. Cir. 1986). There is no greater reason to imply such a requirement with contractors which, as business corporations having limited liability, are better able than are individual employees to limit, insure against, and externalize costs. Contractors also have greater bargaining power to obtain an express indemnity provision.

Where such an indemnity provision was expressly provided in the Department of Energy's contracts with producers of nuclear materials, administrative experience has not been good. The provision opened up opportunities to raid the treasury, and for that reason its use has recently been discontinued by the DOE. *See* GAO, *Managing DOE: Tighter Controls Needed Over the Department of Energy's Outside Litigation Costs* (T-RCED-94-264)(July 14, 1994). Expanding *Spearin* to create an implied indemnity clause in all government contracts for third party tort claims would cast across the whole range of government contracts the administrative can of worms experienced by the DOE.

Nothing prevents the government from contracting for such a provision in particular circumstances, such as it did in the context of the special dangers and urgency of the nuclear enterprise. But the Court would be treading on matters properly assigned to executive discretion and legislative power to now amend all government contracts to add such a provision.

Petitioners' suggestion that this provision would only apply to products requisitioned under the DPA does not make sense. First, as the court below held, the DPA framework expressly provides immunity from third party contract claims that arise from the contractor's forced prioritization of war production over existing commercial contracts. Since the DPA neither provides an indemnity remedy of any kind, nor even extends an immunity from tort claims, it is an inappropriate vehicle for such a major change in the law. Second, within this framework, the DPA expressly leaves manufacturers bargaining power over the "prices and terms of sale", and petitioners were therefore free to bargain for an indemnity provision. 32A CFR Ch. VI, DMS Reg. 1, Dir. 3 §3(b)(3)(1959); *id.* BDSA Reg. 2 §10(c)(1) (1953). Nothing in petitioners' pleading indicated that they had attempted to do so, and were subsequently denied an express indemnity as a condition of sale.

CONCLUSION

Petitioners posture as victims when in fact they victimized veterans twice. First they negligently contaminated their herbicide with dioxin, a highly toxic chemical that was not included in the design specifications. Second, they procured a collusive settlement by which they escaped potentially enormous liability to the veterans, with the cooperation of the federal judiciary.

Federal courts justified the settlement with rulings on fact issues that, however erroneous, effectively imposed a sell-out settlement on unwilling veterans for the benefit of petitioners. These courts denied veterans a jury trial on dispositive fact issues by dictating that no veteran could win an Agent Orange claim. Petitioners, who benefited enormously from them, should now be as bound by those rulings as are the veterans. If no veteran could win an Agent Orange claim, then there was no reason for petitioners to have settled their claims, and no grounds to request indemnification from the government for that settlement. Petitioners should be estopped from arguing otherwise.

That these rulings were, in fact, part of a series of transparent devices to obtain a settlement at a very cheap cost, and that without these payments petitioners would have been liable for enormous damages does not provide an occasion to plead for a new government indemnity.

For these reasons, the decision of the Court of Appeals for the Federal Circuit should be upheld.

Respectfully submitted,

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August 18, 1995